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Dig. § 25.* 13 Va.-W. Va. Enc. Dig. 268; 14 Va.-W. Va. Enc. Dig. 1027; 15 Va.-W. Va. Enc. Dig. 1013.]

3. Partnership (§ 22*)—Agreement—Sufficiency.—Where defendants acquired land under an agreement that they should take the timber and plaintiffs the land, but neither were to have any joint interest in the property or profits received by the other, the agreement can not be enforced as quasi partnership contract.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 1, 7, 8; Dec. Dig. § 22.* 10 Va.-W. Va. Enc. Dig. 839; 14 Va.-W. Va. Enc. Dig. 817; 15 Va.-W. Va. Enc. Dig. 787.]

4. Frauds, Statute of (§ 74)—Contracts with Regard to Land.—Under Code 1904, § 2840, subsec. 6, declaring that no action shall be brought upon any contract for the sale of real estate unless it be evidenced by a contract in writing, a parol agreement, that defendant should acquire timber land and retain the timber, but convey the land, is unenforceable.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 83, 122-131; Dec. Dig. § 74.* 6 Va.-W. Va. Enc. Dig. 522; 14 Va.-W. Va. Enc. Dig. 482; 15 Va.-W. Va. Enc. Dig. 430.]

Appeal from Circuit Court of City of Williamsburg and County of James City.

Bill by F. A. Shield and another against E. S. Adkins & Co. and others. From a decree for defendants, complainants appeal. Affirmed.

Henley, Anderson & Hall, of Richmond, and *Wescott & Turlington*, of Accomack, for appellants.

Bruce Simmons, of Norfolk, *J. Brooks Mapp*, of Accomack, and *F. Leonard Wailes*, for appellees.

WASHINGTON & O. D. RY. v. JACKSON'S ADM'R.

June 10, 1915.

[85 S. E. 496.]

1. Witnesses (§ 402*)—Impeaching Own Witness—Contradicting by Other Evidence.—In an action for the death of a person struck by a car, the mortorman, called by plaintiff as a witness, testified that an object which he took to be a bunch of rags or an old tie, but which proved to be a person, was lying at the ends of the ties outside the rails. The character of the injuries sustained by deceased and the other physical facts demonstrated, however, that he was either lying on one of the rails or on the track between the rails. Held, that plaintiff, by relying on these physical facts, did not violate the

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

rule forbidding a party to impeach his own witness, under Code 1904, § 3351, providing that a party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but that he may, in case the witness shall in the opinion of the court prove adverse, contradict him by the other evidence.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1268; Dec. Dig. § 402.* 13 Va.-W. Va. Enc. Dig. 971; 14 Va.-W. Va. Enc. Dig. 1100; 15 Va.-W. Va. Enc. Dig. 1099.]

2. Trial (§ 156*)—Demurrer to Evidence—Taking View Most Favorable to Plaintiff.—Where, in an action for the death of a person struck by a car, the evidence would have justified the jury in finding that deceased was lying over on the rail, or between the rails, and not outside the rails, as claimed by the motorman, the court, upon a demurrer to the evidence, must find that he was so lying.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 354-356; Dec. Dig. § 156.* 4 Va.-W. Va. Enc. Dig. 471; 14 Va.-W. Va. Enc. Dig. 328; 15 Va.-W. Va. Enc. Dig. 282.]

3. Trial (§ 156)—Demurrer to Evidence—Taking View Most Favorable to Plaintiff.—Where several inferences may be drawn from the evidence differing in degrees of probability, the court must, on demurrer to the evidence, adopt those most favorable to the demurree, unless they be strained, forced, or contrary to reason.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 354-356; Dec. Dig. § 156.* 4 Va.-W. Va. Enc. Dig. 471; 14 Va.-W. Va. Enc. Dig. 328; 15 Va.-W. Va. Enc. Dig. 282.]

4. Street Railroads (§ 114*)—Actions for Death of Persons on Track—Questions for Jury.—In an action for the death of a person struck by a car while lying, presumably asleep, on or near the track, there was evidence that he was lying on the rail, or between the rails, and about 450 feet away in a space illumined by a powerful electric headlight when first seen by the motorman and that the car could have been stopped in 100 feet. The motorman testified that he saw an object which he took to be a bunch of rags or an old tie, that he only glanced at it for half a second, and then directed his gaze up the track, without taking any further account of such object. Held, that a jury might well have found that ordinary vigilance on his part would have disclosed that the object was a human being in ample time to stop the car and avoid the accident.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 239-250; Dec. Dig. § 114.* 12 Va.-W. Va. Enc. Dig. 846; 14 Va.-W. Va. Enc. Dig. 967; 15 Va.-W. Va. Enc. Dig. 950.]

Error to Circuit Court, Fairfax County.

Action by Frank Jackson's administrator against the Washing-

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

ton & Old Dominion Railway. Judgment for plaintiff, and defendant brings error. Affirmed.

C. E. Nicol, of Alexandria, and *W. J. Lambert*, of Washington, D. C., for plaintiff in error.

C. V. Ford and *Wilson M. Farr*, both of Fairfax, for defendant in error.

NORFOLK & W. RY. CO. *v.* ALLEN et al.

June 10, 1915.

[85 S. E. 497.]

1. Pleading (§ 355*)—Limitations—Striking Out Pleas.—Where there are three pleas of the statute of limitations, two of them are properly stricken where the facts proven therein are equally proven under the plea not stricken.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1102-1110; Dec. Dig. § 355.* 11 Va.-W. Va. Enc. Dig. 222; 14 Va.-W. Va. Enc. Dig. 832; 15 Va.-W. Va. Enc. Dig. 805.]

2. Trial (§ 252*)—Instructions—Applicability to Evidence.—In a suit for diverting water from plaintiff's premises by means of a railroad pumping station, an instruction that, if the pumping station was permanent and had existed for five years, plaintiff could not recover, was properly refused, where there was no evidence to support it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.* 7 Va.-W. Va. Enc. Dig. 718; 14 Va.-W. Va. Enc. Dig. 563; 15 Va.-W. Va. Enc. Dig. 513.]

3. Limitation of Actions (§ 55*)—Accrual of Action—Unlawful Structures—Lawful Structures.—Where a permanent structure alleged to constitute a nuisance is unlawful of itself, a cause of action accrues at once upon the erection thereof, but when the structure is lawful, and not per se injurious, a cause of action arises only for injuries resulting from the use thereof.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 299-306; Dec. Dig. § 55.* 10 Va.-W. Va. Enc. Dig. 503; 14 Va.-W. Va. Enc. Dig. 786; 15 Va.-W. Va. Enc. Dig. 746.]

4. Limitation of Actions (§ 55*)—Accrual of Action—Lawful Structure.—In an action for diversion of water from plaintiff's premises by a railroad pumping station, where it appeared that the station was not permanently used, and that no damages had resulted, limitations ran, not from the erection thereof, but from the date of the injury.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 299-306; Dec. Dig. § 55.* 10 Va.-W. Va. Enc. Dig. 503; 14 Va.-W. Va. Enc. Dig. 786; 15 Va.-W. Va. Enc. Dig. 786.]

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